



Federal Communications Commission

Notice of Inquiry into the effect of foreign mobile termination rates - *reply to comments*

an **INTUG** submission
February 2005

Before the Federal Communications Commission
Washington, D.C. 20554

In the matter of the effect of foreign
mobile termination rates on U.S.
customers

IB Docket No. 04-398

introduction The cost of terminating a voice call on a mobile network has received a remarkable amount of scrutiny over the last few years by regulators and policy makers around the world. For all these efforts, the effect on the caller remains the same, a heavy and often punitive charge for a call terminating on a large majority of mobile networks. The growing number of countries with Calling Party Pays (CPP) and of the individuals with phones on such networks has made the problem much worse.

As comments from mobile network operators make clear, a number of foreign regulators have legal tools to address the problem and some have processes underway. The same mobile network operators are engaged in extensive filings and litigation to delay or to negate that regulation. The question the Commission must consider is whether the painfully slow progress being made, in the face of unstinting resistance from mobile network operators, could be accelerated by its support for foreign regulators.

The mobile operators that filed comments are keen to indicate that rates are falling and all accept the WTO obligation to interconnect at cost-oriented prices. Yet, not one operator gives an estimate of when the level of cost orientation might be achieved or even that it will be achieved. As INTUG indicated in its original comments, the mobile network operators have extremely good financial reasons to seek the weakest and the

slowest possible implementation of reductions of FMTRs.

It is necessary to recall the origin of the problem. High domestic mobile termination rates encouraged competitors to refile traffic in other countries, in order to obtain more competitive rates. Operators quickly moved to contain this, by creating separate international termination rates. More detail is set out in the OECD report from 2001 on the international refile of mobile traffic (tromboning).¹

The GSM Europe argues that

After having carefully studied the FCC paper, GSME considers that no real evidence is produced that foreign mobile termination rates are perceived to be a problem for US users. In fact the FCC paper does not cite a single complaint from US users associations or similar organisations.²

We would draw attention to the various comments filed by INTUG to the FCC, USTR, ITU, CITELE and APECTEL over recent years.³ Indeed, one of our earlier comments to the FCC is cited in the comments made by NII Holdings. There can be no dispute that users are seeking redress on this matter.

competition We have not seen any filed comment that proves that competition has had any discernible effect either on mobile termination rates or, more especially, on international mobile roaming rates.

We disagree strongly with the comments of Telecom Italia Mobile (TIM) that "the mobile market in Europe is very competitive".⁴ There is no such thing as a "mobile market", rather there is a series of related markets, of which one is for the termination of calls on the TIM network in Italy. There are separate markets for termination on each of the other Italian networks and indeed for termination on the TIM network in Greece. Separate and distinct markets exist for wholesale roaming, retail roaming, call origination and so on. There are also fixed telephony markets and in some instances these overlap with mobile, for example, in some countries the call origination market comprises both fixed and mobile, where there is a sufficient level of substitutability.

The assertion is made in the comments by Verizon that:

Mobile markets are generally acknowledged to be competitive worldwide, and this vigorous competition is applying downward pressure to mobile termination rates.⁵

¹ [http://www.oelis.oecd.org/olis/2000doc.nsf/0/c125692700623b74c1256a77003a644e/\\$FILE/JT00110190.DOC](http://www.oelis.oecd.org/olis/2000doc.nsf/0/c125692700623b74c1256a77003a644e/$FILE/JT00110190.DOC)

² http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6516887590

³ <http://www.intug.net/submissions/>

⁴ http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6516887338

⁵ http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6516887665

We reject this view, denying the existence of "mobile markets" and also of "vigorous competition". The latter may possibly be justified for mobile call origination markets, though not in all cases (see, for example, the ComReg finding of joint dominance in call origination in Ireland).⁶ There cannot be competition in mobile termination markets under a system of CPP.

We also reject entirely the claim by Orange that:

In the light of the described success of the European mobile market, it is difficult to conceive how consumers could be harmed.

These contentions are neither accurate, nor are they material to the Notice of Inquiry (NOI). INTUG and its European members have argued at length against abuses of market power within Europe.

The mobile network operators are struggling for revenues with which to cross-subsidise call origination and handset prices, to say nothing of paying dividends to stockholders and their UMTS network construction.

**international
mobile
roaming** In his comments Dr Marcus emphasises the success achieved by the FCC through the introduction of effective competition.⁷ We would not disagree with this, but note that causing or creating competition in international mobile roaming has proved, to date, to be impossible.

His proposal that the price of calls be displayed on the screen of the roaming customer has been made in the past and was received with considerable hostility by the Mobile Network Operators (MNOs). We presume this was because people might be discouraged if they knew the price of the call.

If this proposal were to be implemented, then for technical and legal reasons, it would have to be the US-based operator sending a message to a US customer roaming abroad, saying something like "Cingular hopes you enjoy your visit in France. All calls you make or receive will be billed at US\$ 1.69 per minute and data at 7 cents per kilobyte". The charging on the data element remains subject to verification that it complies with truth in billing.

The FCC would be entirely unable to impose such an obligation on the foreign operator and even if such an operator was to accept a voluntary undertaking, they would not know the retail price charged by the US-based operator. However, the Commission would be empowered to

⁶ http://www.comreg.ie/_fileupload/publications/ComReg04118.pdf

⁷ http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6516884501

impose such an obligation on the home operator and there would be no technical difficulty in sending such a message. We trust that no charge would be made for such messages.

From time to time accusations have been made that the mobile network operators engage in collusion on international mobile roaming tariffs. If this were the case, which the operators vigorously deny, then there would be no need for the Commission to intervene, since a class action would be a very effective means to end such a hypothetical abuse.

As we argued in our original comments, it is important to control the abuses at the heart of international mobile roaming, especially now that they have been extended in the mobile data market. As more US-based customers can roam abroad, with the increased adoption of GSM in the USA and the wider availability of multi-mode handsets, then it is important that efforts be made to ensure that roaming markets are competitive.

**calls to
foreign
mobile
networks**

As David Wood from Cheap Telephone Bills.com notes in his comments, improvements in billing for individual customers would be very helpful, so that operators could make more conspicuous the rates associated with specific numbers and calls carrying a surcharge for mobile termination.⁸

The New Zealand Commerce Commission has recently conducted a process very similar to an NPRM on mobile termination rates.⁹ In a reply comment, Vodafone sought to justify the difference between on-net and off-net termination rates. In paragraph 56 it argued that:

The commercial rationale for such price differentials should be readily apparent: mobile networks are seeking to attract groups of users with relatively high within-group calling patterns. This is a discernible market segment, such as would be targeted by any rational seller.¹⁰

While this argument has a superficial plausibility it falls down when it is realised that Vodafone offers cheap on-net calls exclusively on a national basis. Although operating in a great many countries, including its affiliate Verizon Wireless in the USA, it does not offer similar rates for international groups of customers. So that cheap on-net calls appear to be limited by national boundaries which can have no basis in the economics of their network.

Companies with offices in foreign countries or families with relatives living abroad in countries in which Vodafone operates cannot benefit

⁸ http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6516883025

⁹ <http://www.comcom.govt.nz/IndustryRegulation/Telecommunications/Investigations/MobileTerminationRates/reportsandsubmissions.aspx>

¹⁰ [http://www.comcom.govt.nz/IndustryRegulation/Telecommunications/Investigations/MobileTerminationRates/ContentFiles/Documents/VF01 Final Cross submission - PUBLIC.pdf](http://www.comcom.govt.nz/IndustryRegulation/Telecommunications/Investigations/MobileTerminationRates/ContentFiles/Documents/VF01%20Final%20Cross%20submission%20-%20PUBLIC.pdf)

from the offer of cheap on-net calls. In particular, trans-Atlantic offers would be of interest to US-based businesses, as such offers would allow cheaper termination on key European networks.

In its comments:

Orange has seen no evidence suggesting that mobile operators charge discriminatory termination rates to calls originating in the US, or indeed, that mobile termination arrangements are different in respect of these calls.

However, it is important to note that discrimination arises from the point made by Vodafone in New Zealand and echoed in its comments to the Commission, namely that operators consciously discriminate in favour of their domestic mobile customers and against all off-net calls, including those in the USA and especially customers of their own affiliates.

Telecom Italia Mobile observes that:

With mobile call termination US carriers cannot exert reciprocal bargaining power in bi-lateral relationships.¹¹

Of course, where two operators are exchanging traffic the absolute level of the rate may not be material, since they pay only the net amount. So that two operators with roughly equal volumes of traffic have no incentive to reduce their termination rates. This is complicated by roaming call volumes, which need to be considered in such sums.

We concur with the comments of NII Holdings concerning the very high termination rates on the Telefonica de España network in Peru.¹² The domestic rates when re-calculated for Purchasing Power Parity (PPP) are especially onerous.

ITU

Telecom Italia Mobile refers to the role of the International Telecommunication Union (ITU) and its Recommendation D.140.¹³

As the Commission will be aware there was protracted discussion throughout the last ITU-T study period and the issue is again being discussed in the present study period (2004-08). A rapporteur's group has recently been established with the active participation of mobile network operators.

INTUG has made several contributions to the ITU on this matter. However, the progress made has been immeasurably small, not least

¹¹ http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6516887338

¹² http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6516887703

¹³ http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6516887338
and http://www.itu.int/osg/spu/intset/itu-t/d140/d140_e_rev.html

because mobile network operators are there struggling to ensure a basis in the ITU recommendations for their high termination rates.¹⁴

It is important to note than there is no central ITU enforcement mechanism. Instead, it is left to bilateral negotiation between member states to ensure that Recommendation D.140 is observed.

Thus the actions of the FCC in the NOI and any subsequent work are consistent with seeking to implement ITU-T Recommendation D.140.

European Union

Many of the comments made to the Commission relate to the European Union. The claim by operators that the common regulatory framework is now in place across the EU is incorrect and misleading. At the end of 2004, four of the twenty-five member states had failed to transpose the legislation and three of these appear to be extremely deficient. The European Commission has taken legal action against them, but it could be many months or even years before they complete transposition of the directives.

Some twelve member states had failed to conduct any market analyses by the end of 2004. Only Austria, Finland, France, Greece, Ireland, Sweden and the UK had completed analyses of their mobile termination markets by the same date. In the fullness of time *most* member states will probably analyse their mobile termination markets, though this work cannot now be completed in 2005.

The obligation to conduct the analysis is not absolute as stated or implied by some commentators, since it derives from a recommendation, a legal instrument from which a member state may diverge, as is clear from European Union jurisprudence. Equally, an NRA could avoid analysis by informing the European Commission that it did not consider such an exercise necessary. At least one member state is expected not to conduct such an analysis.

So that while the European Union has the legal tools available, they are frequently being used with little evidence of speed or enthusiasm, perhaps because the public authorities consider that operators need the money from high mobile termination rates to pay for the construction of UMTS networks and to subsidise the new handsets.

It will certainly take until the end of the decade to see the majority of MTRs in the EU reduced to anything like cost orientation.

¹⁴ <http://www.intug.net/submissions/>

WTO

We agree with the operators commenting that countries have the absolute right to select Calling Party Pays (CPP), rather than RPP. However, in doing so they must balance this with their commitments to the World Trade Organisation (WTO) and any applicable Free Trade Agreements (FTAs). It is the failure to comply with trade commitments when combined with the absence of competition that gives rise to the problem of very high call termination rates.

Merely reducing rates does not meet WTO commitments. If that process is drawn out over years and decades that would entirely frustrate the commitments. Such failure and violation of WTO commitments is a matter that must be actively pursued by the United States Trade Representative (USTR) in launching a dispute procedure against one or more countries.

The USTR recently published a request for comments in the Federal Register on its forthcoming 1377 Report covering possible violations of trade agreements.¹⁵ It has received responses from a number of US operators and associations, plus some from foreign operators, seeking the support of the USTR in driving down termination rates. The issues and examples raised were not new.

Softbank BB (a Japanese fixed operator) complained of the prices for call termination on mobile networks in Japan.¹⁶ NII Holdings Inc complained of the termination rates in Latin America and, in particular, in Peru.¹⁷ The European Competitive Telecommunications Association (ECTA) complained about fixed-to-mobile rates in Europe.¹⁸ CompTel/ASCENT Alliance complained of fixed-to-mobile rates in Europe, Latin America and Japan.¹⁹ A subsidiary of Orbitel, Cinco Telecom Corp, complained of the high termination rates in its home country, Colombia.²⁰ AT&T about mobile termination rates and the question of the Indian government's ADC regime.²¹

In the first round of comments there were no filings to the USTR in support of higher termination rates.

INTUG filed comments in reply, encouraging the USTR to take strong action on FMTRs.²²

¹⁵ <http://thefederalregister.com/d.p/2004-11-24-04-26033>

¹⁶ http://www.ustr.gov/assets/Trade_Sectors/Services/Telecom/Section_1377/2005_Comments_on_Review_of_Compliance_with_Telecom_Trade_Agreements/asset_upload_file488_6999.pdf

¹⁷ http://www.ustr.gov/assets/Trade_Sectors/Services/Telecom/Section_1377/2005_Comments_on_Review_of_Compliance_with_Telecom_Trade_Agreements/asset_upload_file551_7010.pdf

¹⁸ http://www.ustr.gov/assets/Trade_Sectors/Services/Telecom/Section_1377/2005_Comments_on_Review_of_Compliance_with_Telecom_Trade_Agreements/asset_upload_file400_6995.pdf

¹⁹ http://www.ustr.gov/assets/Trade_Sectors/Services/Telecom/Section_1377/2005_Comments_on_Review_of_Compliance_with_Telecom_Trade_Agreements/asset_upload_file896_6994.pdf

²⁰ http://www.ustr.gov/assets/Trade_Sectors/Services/Telecom/Section_1377/2005_Comments_on_Review_of_Compliance_with_Telecom_Trade_Agreements/asset_upload_file791_7009.pdf

²¹ http://www.ustr.gov/assets/Trade_Sectors/Services/Telecom/Section_1377/2005_Comments_on_Review_of_Compliance_with_Telecom_Trade_Agreements/asset_upload_file991_6992.pdf

²² http://www.intug.net/submissions/USTR_mobile.html

conclusions The effect that gives rise to the abuse is the exercise of power derived from a foreign termination market, power that is then leveraged into the retail call origination market in the USA. The mobile network operators discriminate in favour of their own domestic originating customers and against customers on all other networks. Foreign governments and regulators fail to check the exercise of that abuse of market power or do so in a lethargic, tardy and frequently ineffective manner. It is the combination of that abuse and the failure to contain the abuse that justify the US public authorities in taking action.

There would be a considerable benefit if the USTR and the FCC would act together in pursuing the issue of reducing rates for the termination of calls on foreign mobile networks, with the support of the Department of State. The division of labour is likely to be the USTR working with foreign governments and the FCC working with foreign regulators. From the perspective of foreign governments both the FCC and USTR processes might be considered hostile so that it is important that, wherever possible, the FCC is seen to be acting to support and to encourage regulators in their work.

Many of those regulators are small, lacking the resources of the Commission, in facing the sophisticated onslaught of the regulatory teams from the global cellular operators. It beholds the Commission to offer what assistance and support it can, especially when it will benefit consumers and businesses in the USA.

Were even one US-based operator to offer multi-country on-net calling tariffs, then it would introduce competition on FMTRs and begin to mitigate the problem. There is nothing to stop a US-based operator with foreign affiliates offering US-callers a price comparable to its foreign on-net termination rates or a bucket of minutes including calls terminating on its foreign affiliates. For example, T-Mobile USA could offer calls to T-Mobile Germany or to T-Mobile UK at, say, 5 cents per minute. We are aware of no regulatory obstacle to such an offer. Indeed, by failing to provide such an on-net rate, US-based operators with foreign affiliates are discriminating against their US-based customers.

INTUG

INTUG, the International Telecommunications Users Group (INTUG), is an association of national telecommunications users associations. INTUG was founded in 1974 to act as a single voice for users of telecommunications.

The mission of INTUG is to ensure that users have access to affordable, interoperable telecommunications services and that their voice is heard wherever telecommunications policy is decided. For almost thirty years INTUG has argued for the introduction of competition in

telecommunications and that all users must have access to the benefits of such competition.

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